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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA, *by and through George C. Wallace as its Governor, and* GEORGE C. WALLACE *in his capacity as Governor of the State of Alabama,*

Plaintiffs,

VS.

UNITED STATES OF AMERICA *and* ROBERT S. McNamara, *individually and as Secretary of Defense of the United States of America,*

Defendants.

NO. 15 ORIG.

MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT AND ORIGINAL BILL OF COMPLAINT

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA, by and through George C. Wallace as its Governor, and GEORGE C. WALLACE in his capacity as Governor of the State of Alabama,

Plaintiffs,

VS.

UNITED STATES OF AMERICA and ROBERT S. McNamara, individually and as Secretary of Defense of the United States of America

Defendants.

NO. _____

MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

Now comes the State of Alabama, acting by and through George C. Wallace as Governor of the State of Alabama, and George C. Wallace in his capacity as Governor of the State of Alabama and file this Motion, pursuant to Rule 9, Supreme Court Rules, for leave to file an original bill of complaint, which said bill of complaint is attached hereto, and made a part hereof as if fully set out herein in detail.

This the 17th day of May, 1963.

Attorneys for the Plaintiffs

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA, by and through George C. Wallace as its Governor, and GEORGE C. WALLACE in his capacity as Governor of the State of Alabama,

Plaintiffs,

VS.

UNITED STATES OF AMERICA and ROBERT S. McNamara, individually and as Secretary of Defense of the United States of America

Defendants.

NO. _____

COMPLAINT

Now comes the State of Alabama, acting by and through George C. Wallace, as its Governor, and George C. Wallace in his capacity as Governor of the State of Alabama, and would show unto this Honorable Court as follows:

1. George C. Wallace is the Governor of the State of Alabama and he is presently acting as Governor of the State of Alabama. His residence and the seat of Government is Montgomery, Alabama. Robert S. McNamara is Secretary of Defense of the United States of America. His address is Washington, D. C.

2. This Honorable Court has original jurisdiction of this cause under the provisions of Article 3, Section 2, Clause 2 of the Constitution of the United States. This Honorable Court

also has jurisdiction of this cause pursuant to the provisions of Title 28, Section 2201, United States Code, and Title 28, Section 1251, United States Code.

3. Plaintiffs aver that heretofore on, to-wit: May 12, 1963, the President of the United States did direct the Defendant Robert S. McNamara, Secretary of Defense, to send members of the Armed Forces into the State of Alabama. Plaintiffs aver that the President of the United States cited the provisions of Title 10, Section 333, United States Code as authority for the sending of said members of the Armed Forces into the State of Alabama to suppress "domestic violence". Plaintiffs aver that Title 10, Section 333, United States Code is unconstitutional and void.

4. Plaintiffs aver that pursuant to the directive of the President of the United States and on order of the Defendant McNamara, members of the Armed Forces of the United States are deployed presently in the City of Birmingham, Alabama, and at two Federal reservations, viz: Fort McClellan, Alabama, and Maxwell Air Force Base, Alabama, and that the President of the United States has threatened to use said Armed Forces in Birmingham, State of Alabama, for the alleged purpose of suppressing domestic violence, all in violation of the sovereignty of the State of Alabama and the Constitution of the United States.

5. Plaintiffs aver that on and before, to-wit: May 12, 1963, Martin Luther King, Fred Shuttlesworth, Ralph Abernathy, Wyatt Tee Walker and other Negroes had led or incited unlawful parades and racial demonstrations in the City of Birmingham, Alabama, and that various demonstrators committed acts of violence upon police and law enforcement officials of the City of Birmingham, Alabama and the State of Alabama.

6. Plaintiffs aver that on, to-wit: May 11, 1963, two bombing incidents occurred in the City of Birmingham, Alabama by parties unknown at this time and that hundreds of Negroes rioted and caused severe personal injuries and property damage within the City of Birmingham, Alabama.

7. Plaintiffs aver that law enforcement officials of the State of Alabama, the County of Jefferson, State of Alabama, and the City of Birmingham, Alabama, have taken such measures as were necessary to suppress the domestic violence which has occurred within the State of Alabama and the City of Birmingham as hereinabove alleged. Plaintiffs aver that the duly constituted authorities of the State of Alabama, Jefferson County, Alabama, and the City of Birmingham are able to suppress the domestic violence which has occurred in Birmingham, Alabama and Plaintiffs aver that said constituted authorities are able and will not fail or refuse to suppress

domestic violence which may occur within the State of Alabama in the future.

8. Plaintiffs aver that neither the Legislature of the State of Alabama nor the Governor of the State of Alabama has made application to the United States of America or to the President of the United States of America for the sending of members of the Armed Forces of the United States to suppress domestic violence, but on the contrary, the Plaintiff George C. Wallace as Governor of the State of Alabama, has repeatedly requested the President of the United States to remove said members of the Armed Forces which have been sent to the State of Alabama, as aforesaid. The President of the United States has refused to rescind his order to the Defendant McNamara to send members of the Armed Forces of the United States into the State of Alabama for the alleged purpose of suppressing domestic violence in the State of Alabama.

9. Plaintiffs aver that the United States must guarantee to every State of the Union a republican form of government, and must protect each of them against invasion and upon application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic violence, under the provisions of Article 4, Section 4 of the Constitution of the United States.

10. Plaintiffs aver that the President of the United States exceeded his constitutional and statutory authority by directing the Defendant McNamara to deploy members of the Armed Forces in the State of Alabama for the alleged purpose of using them to suppress domestic violence under the circumstances as alleged hereinabove, and that the Defendant McNamara exceeded his constitutional and statutory authority.

11. There is, therefore, a justiciable controversy existing between the Plaintiffs and the Defendants, within the meaning of Title 28, Section 2201, United States Code.

12. Plaintiffs aver that irreparable harm will result unless the Defendants are restrained from deploying members of the Armed Forces in the State of Alabama with the intention of using said members of the Armed Forces to suppress domestic violence in the State of Alabama, unless and until the Legislature or the Executive (when the Legislature cannot be convened) makes application for the use of members of the Armed Forces of the United States under the provisions of Article 4, Section 4 of the Constitution of the United States.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray:

(a) That this Honorable Court will take jurisdiction of this cause and the parties hereto and will cause its process to issue to the Defendants commanding them to answer or

plead within the time allowed by law or the rules of this Honorable Court.

(b) That this Honorable Court will advance this cause on the docket and expedite the same.

(c) That this Honorable Court will declare the rights and other legal relations of the parties hereto, and will enter an order declaring that the Defendants are without authority to deploy members of the Armed Forces in the State of Alabama to suppress domestic violence unless and until the Legislature of the State of Alabama or the Executive (if the Legislature cannot be convened) makes application for such Armed Forces.

(d) That this Honorable Court will issue a temporary restraining order enjoining and restraining the Defendants, their agents, servants and employees, from deploying members of the Armed Forces in the State of Alabama to suppress domestic violence unless and until the Legislature of the State of Alabama or the Executive (if the Legislature cannot be convened) makes application for such Armed Forces.

(e) That after notice and a hearing this Honorable Court will issue a preliminary or permanent injunction enjoining and restraining the Defendants, their agents, servants and employees, from deploying troops of the Armed Forces in the

State of Alabama to suppress domestic violence unless and until the Legislature of the State of Alabama or the Executive (if the Legislative cannot be convened) makes application for such Armed Forces.

(f) That this Honorable Court will declare Title 10, Section 333, United States Code unconstitutional.

(g) That this Honorable Court will declare the Fourteenth Amendment to the Constitution of the United States null and void.

(h) That this Honorable Court will grant such other and further relief as may seem meet and proper in the premises.

This the 17th day of May, 1963.

George C. Wallace, as Governor of the State of Alabama.

Thos. F. Keech

Attorneys for the Plaintiffs

VERIFICATION

STATE OF ALABAMA)
MONTGOMERY COUNTY)

Before me Mabel Cowan, a Notary Public in and for the State of Alabama at Large, this date personally appeared George C. Wallace, who is known to me and after being first duly sworn, deposes and says: That he has read the allegations of the foregoing Bill of Complaint and that the matters and things related and averred therein are true and correct to the best of his knowledge, information and belief, which matters and things he verily believes to be true as alleged in said Complaint.

Done this 17th day of May, 1963.

George C. Wallace

Sworn to and subscribed before me this 17th day of May, 1963.

Notary Public

CERTIFICATE

I hereby certify that I have served a copy of the Motion for Leave to file an Original Bill of Complaint and Original Bill of Complaint upon the Solicitor General, Department of Justice, Washington 25, D. C. by mailing a copy to him, postage prepaid, on this the 18th day of May, 1963.

John P. Nolan

Office-Supreme Court, U.S.
FILED
MAY 23 1963
JOHN F. DAVIS, CLERK

No. 15 Orig.

In the Supreme Court of the United States

OCTOBER TERM, 1962

STATE OF ALABAMA, by and through George C. Wallace as its Governor, and GEORGE C. WALLACE in his capacity as Governor of the State of Alabama, PLAINTIFFS

v.

UNITED STATES OF AMERICA and ROBERT S. McNAMARA, individually and as Secretary of Defense of the United States of America

BRIEF IN RESPONSE TO MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

ARCHIBALD COX,
Solicitor General,

RALPH S. SPRITZER,
LOUIS F. CLAIBORNE,
Assistants to the Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1962

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STATE OF ALABAMA, by and through George C. Wallace as its Governor, and GEORGE C. WALLACE in his capacity as Governor of the State of Alabama, PLAINTIFFS

v.

UNITED STATES OF AMERICA and ROBERT S. MCNAMARA, individually and as Secretary of Defense of the United States of America

BRIEF IN RESPONSE TO MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

The defendants oppose the motion for leave to file an original bill of complaint upon two grounds:

1. The complaint in seeking to restrain future action by the President of the United States by a proceeding against the defendant Secretary fails to state a claim upon which relief can be granted because the President has ample constitutional and statutory authority for any action taken or contemplated.

2. The complaint cannot be entertained against

the United States because there has been no consent to the suit.

Since the latter ground is not dispositive as to both defendants, leave to file should be denied upon the express ground that the complaint is without substantive merit.

STATUTE INVOLVED

Section 333 of Title 10, United States Code, provides:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—
>
> (1) so hinders the execution of laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail or refuse to protect that right, privilege, or immunity, or to give that protection; or
>
> (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.
>
> In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

STATEMENT

Invoking the original jurisdiction of this Court, plaintiffs seek injunctive and declaratory relief against defendants. Specifically, the Court is asked to restrain the defendants and their agents "from deploying troops of the Armed Forces in the State of Alabama to suppress domestic violence unless and until the Legislature of the State of Alabama or the Executive (if the Legislature cannot be convened) makes application for such Armed Forces," and to declare Section 333, as well as the Fourteenth Amendment to the United States Constitution, null and void.

The complaint alleges in substance that the President has directed the Secretary of Defense to send federal soldiers into the State; that, prior to the issuance of this directive, there had been parades, demonstrations and acts of violence in the City of Birmingham; that State officials have taken measures necessary to suppress violence and are willing and able to do so in the future; that State authorities have not sought aid from the Armed Forces of the United States; that in these circumstances the President and the Secretary are without constitutional and statutory authority "to deploy members of the Armed Forces in the State of Alabama for the alleged purpose of using them to suppress domestic violence"; and that irreparable harm will result unless the defendants are restrained as requested.

In summary, then, the complaint challenges the constitutional and statutory powers of the President to invoke and act under Section 333, although, it should be noted, it cites no order of the President in-

voking that Section and alleges no action by the President or the Secretary beyond the deployment of troops.

We submit that this bare challenge to the President's constitutional and statutory powers should be rejected as without legal foundation. The portions of this Statement which follow are designed solely to set forth in brief outline the background against which the present controversy has emerged. The facts to which we allude for this purpose are matters of common knowledge.

On or about April 3, 1963, Negroes in the City of Birmingham instituted a series of steps designed to reduce the practice of racial segregation in that city. Various demonstrations followed, and large numbers of arrests were made by local police authorities for alleged violation of a city ordinance prohibiting parades without a permit. On April 10, a State court injunction was issued forbidding racial demonstrations. The demonstrations continued, and by May 8, 1963, more than 2,200 demonstrators had been arrested. On that date, a moratorium on further demonstrations was announced by leaders of the Negro community pending the outcome of discussions with various members of the Birmingham business community. On May 10, the parties to these discussions were reported to have agreed on various voluntary measures designed to ease racial controversy within the city.

On the night of May 11-12, however, two bombings took place. One of these partially destroyed the home of the Reverend A. D. King, a Negro minister, and

another damaged the A. G. Gaston Motel, the headquarters of the Negro campaign, injuring four persons. A serious riot thereupon ensued, during the course of which numerous persons were injured and substantial property damage occurred.

On the evening of May 12, 1963, President Kennedy issued a statement reading in pertinent part as follows:

> * * * This Government will do whatever must be done to preserve order, to protect the lives of its citizens and to uphold the law of the land.
>
> * * * *
>
> * * * I have instructed Secretary of Defense McNamara to alert units of the Armed Forces trained in riot control and to dispatch selected units to military bases in the vicinity of Birmingham. * * * Finally I have directed that the necessary preliminary steps to calling the Alabama National Guard into Federal service be taken now so that units of the Guard will be promptly available should their services be required.
>
> It is my hope, however, that the citizens of Birmingham themselves maintain standards of responsible conduct that will make outside intervention unnecessary and permit the city, the State and the country to move ahead in protecting the lives and the interests of those citizens and the welfare of our country.

Following this statement, a number of military units were dispatched to federal bases or installations in Alabama. In all, approximately 3,000 soldiers were sent to Fort McClellan, 60 miles east of Birmingham, and to Maxwell Air Force Base 90 miles south of the

city. In addition, a few (presently three) army personnel are using office space leased to a federal agency in Birmingham, Alabama.

ARGUMENT

THE COMPLAINT AGAINST THE SECRETARY FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Introduction and Summary

We believe that the complaint against the defendant McNamara, insofar as it is justiciable, is within the original jurisdiction of this Court.[1] Article III, Section 2 of the United States Constitution and 28 U.S.C. 1251 confer upon the Court original jurisdiction of all actions by a State against a citizen of another State.[2] The allegation that this defendant's action is in excess of constitutional or statutory authority is apparently sufficient to make the suit one against him as an individual rather than a suit against the United States without its consent. Compare *Youngstown Co.* v. *Sawyer*, 343 U.S. 579; see,

[1] The action cannot be maintained against the United States for want of its consent to suit. The decisions of this Court have firmly established the applicability of the doctrine of sovereign immunity to a suit by a State against the federal government. Ever since *Kansas* v. *United States*, 204 U.S. 331, this principle has been accepted without qualification. See, *e.g.*, *Minnesota* v. *United States*, 305 U.S. 382, 387 ("The exemption of the United States from being sued without its consent extends to a suit by a State", Brandeis, J.), and *Arizona* v. *California*, 298 U.S. 588. It has only recently been confirmed in *Hawaii* v. *Bell*, October Term, 1962, No. 12 Original, decided April 29, 1963.

[2] The defendant McNamara is a citizen of Michigan.

also, *Ex parte Young*, 209 U.S. 123; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643.

We also believe it appropriate, even though this Court's original jurisdiction in the matter is not exclusive, to have questions raised by a State as to the scope of the President's power and duty, under the Constitution and acts of Congress, to use federal troops in the preservation of order and for the protection of constitutional rights decided directly by the highest tribunal. A prompt decision authoritatively determining the powers of the President may reduce the danger of domestic violence and of unlawful combinations and conspiracies depriving citizens of constitutional rights that a State may be unable or unwilling to protect. We accordingly urge the Court, in its disposition of the plaintiffs' motion, to make it clear that the President is not without power, should future eventualities require it, to take upon his own initiative those steps authorized by Section 333 in order to safeguard the constitutional rights of citizens of the United States.

While agreeing, for the reasons just stated, that this Court should decide the legal issues presented, we nevertheless believe that the motion for leave to file the complaint should be forthwith denied, because the case tendered by the State is without merit. There is, of course, ample precedent for rejecting a motion to file a complaint upon that ground. See, *e.g.*, *Alabama* v. *Texas*, 347 U.S. 272; *California* v. *Washington*, 358 U.S. 64.

Our argument on the merits may be summarized as follows:

a. Section 333 places upon the President the explicit duty to use federal troops, under stated conditions, in order to quell domestic violence or unlawful combinations. There is, and could be, no allegation that the President has acted or intends to act in any manner not authorized by 10 U.S.C. 333 and related statutes. The allegation that Alabama officials have not requested the President to send federal troops and have requested their removal from Alabama is irrelevant because Section 333 requires the President to act upon his own appraisal of conditions even though State officials have not requested federal intervention.

There is no room for judicial review of a Presidential determination that the conditions stated in Section 333 have arisen and require him to take "such measures as he considers necessary." Cf. *Martin* v. *Mott*, 12 Wheat. 19, 28-33. *A fortiori*, a court will not interfere with the entirely preliminary assignment of segments of the Armed Forces to points from which they can be conveniently deployed in the unhappy event that the conditions stated in Section 333 should be found to have arisen. Even more obviously, a court will not interfere in advance, by injunction or declaratory judgment, with the President's performance of his duty to determine whether federal intervention is required and, if so, what measures are appropriate.

b. The attack upon the constitutionality of Section 333 is also unfounded. The United States, although

composed of sovereign States, is one nation. Its people have rights, privileges and immunities under the Constitution and laws of the United States which the federal government has an independent power and duty to protect. As the Court said in *In re Debs*, 158 U.S. 564, 582, "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care." See also *Ex parte Siebold*, 100 U.S. 371, 395. Section 333 does not purport to confer, and the President does not claim, power to use troops to deal with ordinary domestic violence. The power and duty is to put down any "insurrection, domestic violence, unlawful combination, or conspiracy" which either (1) hinders the execution of State or federal laws with the effect of depriving a part of the people of constitutional rights that the State authorities fail or are unable to protect or (2) obstructs the execution of the laws of the United States. In each event the President's action is tied to the enforcement of federal rights or duties. If a State fails, for whatever reason, to safeguard the fundamental rights of a portion of its people (including the rights to life and the security of person and property), it deprives them, by such action or inaction, of the Fourteenth Amendment's guarantee of equal protection of the laws; and it then becomes the duty of the federal government to act. Section 333 thus implements the Fourteenth Amendment and is plainly a valid execution of the power, conferred in Section 5, to "enforce, by appropriate legislation, the provisions of this Article."

c. Although a rejection of the constitutional claims of the State would make it unnecessary to consider other obstacles to the plaintiffs' claim to relief, we point out additionally that traditional grounds for equitable intervention are lacking. The bare allegation of threatened irreparable harm to the State is unsupported by any averments of fact. And there would be no justification, particularly in the present posture of affairs, for taking the extraordinary step of issuing an injunction or declaration designed to limit the President's choice of a course of action in some future emergency the full nature of which cannot now be foreseen.

A.

The Preparations Made by the Executive and the Action Apprehended by the Plaintiffs in the Event of an Emergency Are Authorized by United States Code, Title 10, Section 333.

Section 333 of Title 10 of the United States Code confers upon the President the power and duty of using federal troops where necessary to suppress domestic violence (or unlawful combinations or conspiracies) that either obstructs the execution of the laws of the United States or deprives any part of the people of a State of constitutional rights that the State is unwilling or unable to protect. It is not, and cannot be, alleged that the Executive contemplates any action not authorized by Section 333; and we assume, therefore, that the gist of the complaint is an attack upon the constitutionality of that Section—an issue considered in Point B. Out of an abundance

of caution we emphasize here (1) that all of the federal action challenged or apprehended by the complainant is within the express authority granted by law and (2) that neither a President's determination concerning the existence of conditions requiring his intervention under Section 333 nor the measures he might adopt would be subject to judicial review.

1. Alabama complains that the President, citing Section 333, directed the Secretary to post troops at federal installations in Alabama in readiness to be employed by the President in Birmingham if violence should break out anew. But that is precisely the duty placed upon the President by Section 333 in the unhappy event that either of two stated conditions appears, *viz.*—

(a) the violence (or an unlawful combination or conspiracy) obstructs the execution of federal law; or

(b) the violence (or unlawful combination or conspiracy) so hinders the ordinary processes of law enforcement that a part or class of people are deprived of federal constitutional rights, including the right to equal protection of the laws, which the State authorities are unable, fail or refuse to protect.

The President, in short, has made no claim to authority in the premises other than that conferred by Section 333,[3] and he has repeatedly expressed the

[3] The President, of course, has other related powers and duties, not here involved, that future events might require him to exercise; for example, the responsibility of dealing

hope that it will prove unnecessary for him to draw upon these statutory powers. Certainly no court can state in advance that the conditions described in the statute cannot arise.

The allegation that the Alabama authorities have not requested Presidential action is irrelevant. Section 333 shows upon its face that no such request is required to give the President the authority. It is the President who is directed, in the circumstances specified, to use the militia or Armed Forces or to take such other measures "as he considers necessary;" and it is the President alone who has the responsibility of appraising the prevailing conditions and determining whether federal constitutional rights are being impaired by a breakdown of local law enforcement or by a failure to apply the law evenhandedly in suppressing violence. It would have stultified the legislation to make Presidential action contingent upon the concurrence of State officials. The statute, enacted in its original form in 1871 (see discussion in Point B, *infra*), was aimed not only at situations in which State authorities might be unable to cope with an assault upon the rights of a group or class of the people but also, as its language attests, at cases in which State officials might "refuse" to act. Congress must have been fully aware that it

---

with "unlawful obstructions, combinations or assemblages" that make it impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings. See 10 U.S.C. 332. It is also unnecessary, in view of the specific statutory basis for Presidential action in the present context, to consider the scope of the President's inherent powers. Cf. *In re Debs*, 158 U.S. 564.

would be futile indeed to expect State officials who had refused to accord the protection of the laws to a particular class of citizens to invite the federal government to intervene to protect them.

The argument also ignores historic principles. The people of the United States, while citizens of the States, are also citizens of the United States. All of them are entitled to the protection of the United States in the rights, privileges and immunities secured by the Constitution. It is the obligation of the federal government to all classes of people, in the event of a breakdown of local authority, to take the action necessary to preserve order and safeguard them in the exercise of their federal constitutional rights. Section 333 was enacted pursuant to this obligation. See Point B, *infra*. The power and duty of the national government could not be left dependent upon the wishes of State officials.

It is equally irrelevant to any issue before the Court that the complaint alleges the ability of the State and local authorities to suppress domestic violence. If the local authorities prove able and willing to follow that course and to preserve order in a way that secures for all the people of Alabama the rights, privileges, immunities and protection accorded by the Constitution, then there will be no occasion for Presidential intervention. But the allegations of intent cannot relieve the President of the right and duty to prepare for all contingencies and to make the independent determination required by Section 333.

2. There is no room for judicial review of Presidential action under Section 333. In *Martin* v. *Mott*,

12 Wheat. 19, involving a parallel statute (1 Stat. 424) authorizing the President to call forth the militia to execute the laws of the United States, suppress insurrections and repel invasions, the Court unanimously held (pp. 28-31):

> We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. * * *
>
> * * * He is necessarily constituted the judge of the existence of the exigency, in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law. * * *[4]

Similarly, Section 333 puts upon the President the duty of deciding when there is an exigency requiring his intervention in order to suppress insurrection or domestic violence obstructing the execution of the federal laws or depriving any class of persons of constitutional rights that the State is unable or unwilling to protect. The express mandate is that the President shall take "such measures as *he* considers necessary" (emphasis supplied).

The natural meaning of the words is confirmed by the nature of the power and the exigencies in which it is to be exercised. The power is confided to the Chief Executive and Commander-in-Chief.

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[4] See, also, *Luther* v. *Borden*, 7 How. 1, 42, 45; *Mississippi* v. *Johnson*, 4 Wall. 475, 498-499; *Consolidated Coal & Coke Co.* v. *Beale*, 282 Fed. 934 (S.D. Ohio).

This alone would be a strong indication of the absence of judicial review.[5]

Furthermore, as in *Martin* v. *Mott*, *supra*, 12 Wheat. at 30, "The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." Upon such occasions there are neither opportunities for judicial review nor criteria for judicial determination.[6] It needs no argument to demonstrate that decisions to call upon the Armed Forces to repel invasion, to curb insurrection or to suppress domestic violence which destroys the constitutional rights and threatens the lives and safety of a large class of citizens of the United States are of a kind which require an awareness and assessment of facts and information ordinarily available only to the executive branch of the government. It is equally apparent that situations of such danger and delicacy may change from hour to hour and that the existence of the power to judge and to act immediately is of the essence. One can conceive of no category of cases which would more surely defy the processes

[5] See *Prize Cases*, 2 Black 635; *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U.S. 163; *Orloff* v. *Willoughby*, 345 U.S. 83; cf. *Moyer* v. *Peabody*, 212 U.S. 78; Administrative Procedure Act, Sec. 10, 5 U.S.C. 1009.

[6] Compare, *Coleman* v. *Miller*, 307 U.S. 433, 454-455, and *Baker* v. *Carr*, 369 U.S. 186, 210, where the Court has stated: "In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."

and standards of determination by litigation.[7]

It is even plainer that the Executive alone must decide whether to assign troops to particular federal installations in the interest of preparedness. No intervention in Birmingham has yet taken place and it is greatly to be hoped that the people of that city will solve the difficulties, without disorder, at the local level. Nonetheless, the responsibility for deciding whether to take precautions (as well as the choice of precautionary measures) against a breakdown of local responsibility remains. That power exists entirely apart from Section 333; it is an attribute of the President's constitutional duties as Chief Executive and Commander-in-Chief of the Armed Forces.

Still more obvious, no court will undertake to conjure up in advance the conditions which the President might face on some unborn day and attempt to define for him, by prescient declaration or injunction, the circumstances in which it might become imperative for him to act or the means he should choose.

B.

Section 333 Is Constitutional

Preliminarily, it will be helpful to correct the fundamental misconception underlying the entire

---

[7] Comparable, though less obvious, cases are presented when a party seeks adjudication of a delicate question affecting the conduct of foreign relations (See *Doe* v. *Braden*, 16 How. 635; *Terlinden* v. *Ames*, 184 U.S. 270; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297) or one relating to the duration of hostilities (*Commercial Trust Co.* v. *Miller*, 262 U.S. 51).

complaint by describing the several statutory sources of Presidential authority to use troops in exigencies created by domestic disorder, and also the quite different constitutional bases upon which the statutes rest. For, contrary to the plaintiffs' mistaken assumption, the constitutional authority for Section 333 is not Article IV, Section 4; it is Article I, Section 8, and Section 5 of the Fourteenth Amendment.

Congressional authority for Presidential use of federal troops in certain cases of domestic violence and related unlawful combinations or assemblages is found in the three substantive provisions of Chapter 15 of Title 10 of the United States Code. Section 331 provides—

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

Here, clearly, is authorization to come to the aid of a beleaguered State, in the event of insurrection *against the State government.* This provision implements Article IV, Section 4, which promises the several States that the federal government stands ready to "protect each of them * * * on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." Quite reasonably, Presidential action in this instance depends upon a local request, both by statute and

under the Constitution. The national government has no occasion to interfere, short of an invitation, if the problem is local, the federal laws are being enforced, and no federal rights are in jeopardy.

The second provision is Section 332:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

The contrast between Section 331 and Section 332 is at once apparent. In the situation envisaged by Section 332 there is no question of protecting the State from internal difficulties; the occasion for action is rebellion directed *against the United States* and the purpose of intervention is to vindicate *federal* authority and assure enforcement of *federal* law. The statute accordingly makes no provision for an invitation by State officials. Nor is the State's consent constitutionally requisite.

The reasons are obvious. In the first place, State officers may themselves be parties to the conspiracy against federal authority. See *Cooper* v. *Aaron*, 358 U.S. 1. More fundamentally, the President's duty to preserve federal law cannot be dependent on the wishes of any State administration, for his constitutional mandate to "take Care that the Laws be

faithfully executed," Art. II, Sec. 3, is not conditioned upon State approval. See *Ex parte Siebold*, 100 U.S. 371, 395-396. Probably, as Commander-in-Chief, he had the implied authority to use the Armed Forces of the Nation, including the State militia, to execute the laws of the United States (Art. 2, Sec. 2; *In re Debs*, 158 U.S. 564, 582), but in any event, Congress in 1792 put his power on a statutory footing and beyond question. Act of May 2, 1792, Sec. 2, 1 Stat. 264; Act of February 28, 1795, Sec. 2, 1 Stat. 424.

Section 332, therefore, is unrelated to Article IV, Section 4. Congress was here invoking its own constitutional power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Article I, Sec. 8. The United States is not a mere confederation operating by and through the States. "The government of the Union * * * is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *McCulloch* v. *Maryland*, 4 Wheat. 316, 404-405. While under our dual system of sovereignty the powers of government are distributed between the State and the Nation, and while the latter is a government of limited powers, nevertheless within its constitutional sphere the national government has all the attributes of sovereignty and in the exercise of its enumerated powers acts directly upon the citizen and not through the intermediate agency of the States. It has the power to command obedience to its

laws, and hence the power to keep the peace to that extent. *In re Debs*, 158 U.S. 564, 578-579; *Lane County* v. *Oregon*, 7 Wall. 71, 76; *Ex parte Siebold*, 100 U.S. 371, 395. Section 332 is plainly constitutional.

We turn to Section 333, which provides:

> The President, by using the militia or the Armed Forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—
>
> (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
>
> (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.
>
> In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

The second paragraph of Section 333 is of a piece with Section 332, and rests upon the same constitutional footing. The first paragraph differs in that the emphasis is upon the protection of constitutional rights, privileges and immunities under the federal

union as distinguished from the second paragraph's emphasis upon enforcement of federal legislation. The principle, however, is identical. Both provisions are wholly independent of Article IV, Section 4, for they are concerned not simply with domestic violence and unlawful combinations or conspiracies but with the relationship—the rights and duties—between the national government and the people. Neither makes the President's authority dependent upon the invitation or consent of State authorities. Both are tied to the federal laws and Constitution. As the Court held in *In re Debs*, 158 U.S. 564, 582, the power of the national government to enforce its laws and protect the rights of its citizens are not at the mercy of a State. "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers *and the security of all rights entrusted by the Constitution to its care*" (emphasis added).

Specifically, the first paragraph of Section 333 has its foundation in Section 5 of the Fourteenth Amendment which expressly authorizes the Congress to enforce the Amendment "by appropriate legislation."* Cf. *Strauder* v. *West Virginia*, 100 U.S. 303, 311; *Virginia* v. *Rives*, 100 U.S. 313, 317-318; *Ex parte*

*The challenge to the validity of the Fourteenth Amendment presents nothing of substance. The vitality of the Amendment is sufficiently attested by the hundreds of cases decided under it for the greater part of a century. In any event, as this Court held in *Coleman* v. *Miller*, 307 U.S. 433, and recently reiterated in *Baker* v. *Carr*, 369 U.S. 186, 214, the ratification process does not present a justiciable issue. See, also, *Leser* v. *Garnett*, 258 U.S. 130, 137.

Virginia, 100 U.S. 339, 344-346; *Monroe* v. *Pape*, 365 U.S. 167, 171-172. Indeed, Section 333 is derived from Section 3 of the Act of April 20, 1871, 17 Stat. 13, 14, which was an act "To Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes." President Grant, in proposing the measure, explained—

> A condition of affairs now exists in some of the States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States. [7 Richardson, *Messages and Papers of the Presidents*, p. 127; House Exec. Doc. No. 14, 42d Cong., 1st Sess.]

As the text itself reflects, the prime object of the provision was to secure equal protection of the laws to those—largely former slaves—to whom the State was unable or unwilling to accord it. See H.R. No. 320, 42d Cong., 1st Sess.;: 98 Cong. Globe 317, 322, 335, 339-341, 366-370, 374-376, 384, 390-392, 412-415, 425-429, 436-440, 442-451, 456-461; 99 Cong. Globe App. 71.

Since Alabama challenges Section 333 even before its implementation (which may never occur), it is impossible to foretell exactly what constitutional rights might be put in jeopardy by the failure or inability of the State to suppress domestic violence or unlawful combinations and conspiracies. But the basic right, which might be threatened in various ways, is the Fourteenth Amendment's guarantee of the equal protection of the laws.

If anarchy runs riot, life itself is in serious peril, and all the most fundamental rights of liberty and property are threatened. Under normal conditions the attack of one private citizen upon another, or the attack of one group upon another, raises no question of constitutional safeguards. The Constitution secures life, liberty and property and other civil liberties, such as freedom of speech, assembly and association, only against deprivation by government. But when the law and order ordinarily preserved by a State break down in one of its communities, its inhabitants, of whatever race or color, are deprived of the protection of the laws because of the State's unwillingness or inability to perform the sovereign's first and fundamental duty—to provide its people, their property and activities with the protection of the law.

The lack of the *equal* protection that would offend the Fourteenth Amendment may result in several ways. There is the possibility of some of the cruder forms of discrimination resulting when a State fails to protect a class or part of its people, because of their race or color, against aggression by rioters or unlawful combinations. There is the subtler danger

that the conspirators may be permitted to win peace, or order may be preserved, upon terms that deny some part of the people important constitutional freedoms guaranteed by the Bill of Rights through the Fourteenth Amendment. Again, the inequality may affect all the people of a particular locality without regard to race or color. Manifestly, there is a lack of equal protection if the State is unable or unwilling to preserve order in one community in a way that safeguards federal constitutional rights, while it maintains the customary peace and order in others.

We need not explore all the possibilities. At this juncture it is enough that the provision is valid on its face. We cannot know whether the occasion for invoking the statute will actually arise. Nor need we examine the precise circumstances which might justify the contemplated intervention. It is sufficiently clear, however, that the prevailing situation in Birmingham may deteriorate in such a way as to require action under Section 333. Without pretending to foretell the course of events, we must note the danger that the equal protection of the laws will not be secured to all the residents of the beleaguered city without federal assistance. We need conclude only that such an eventuality would authorize the action contemplated by Section 333, and that the constitutionality of such intervention would be beyond doubt.

C.

The Complaint Fails to Satisfy Traditional Requirements for the Grant of Equitable Relief.

If, as argued immediately above, the basic attack upon the constitutionality of Section 333 must be rejected as insubstantial, the case is at an end. Nonetheless, we point out additionally that the complaint in this case would in no event warrant the relief sought.

Plaintiffs make a bare allegation of threatened irreparable harm but fail to specify at all, much less with particularity, what injury would be suffered.[9] As already emphasized, the President is authorized to act under Section 333 only to secure federal rights which would otherwise go unprotected. And it cannot be presumed that he would act for any purpose other than that authorized, *Martin* v. *Mott*, *supra*, 12 Wheat. at 32-33. It is difficult to see by what process of reasoning an act of Presidential intervention occasioned by necessity and designed to secure the fundamental rights of citizens of the United States could be deemed a threat of irreparable harm cognizable by a court of equity. Certainly, the State does not suggest that it has any interest contrary to the maintenance of order and the protection of constitutional rights.

---

[9] A demonstration of irreparable harm has always been a prerequisite to the grant of equitable relief in the federal courts. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500. Moreover, the burden of establishing entitlement to injunctive relief is a particularly heavy one where the suit is against public authority. *Yakus* v. *United States*, 321 U.S. 414, 440.

The unavailability of injunctive relief is further emphasized by the consideration that the President has not invoked his authority under Section 333 or taken any action other than those preparatory measures which would enable him to act with dispatch should future contingencies require it. Whether there will be any future movement of federal troops from federal installations to the City of Birmingham is entirely speculative. Thus, plaintiffs are necessarily forced to the extremity of contending that in no event and in no circumstances would the President be authorized to act upon his own initiative in order to fulfill the duty which Congress has directly imposed upon him. At best, such a contention would be tenable only if the statute were plainly unconstitutional on its face. Since, for the reasons already indicated, this is palpably untrue, certainly the courts will not intervene upon the hypothetical and unwarranted assumption that the President might act in disregard of statutory limitations. No more will the courts attempt to predict the conditions which the Chief Executive may encounter or hamper the exercise of his discretion in deciding upon the appropriate measures of response.

CONCLUSION

The motion for leave to file the complaint should be denied because the challenge to the constitutionality of Section 333 is unfounded and the complaint states no cause of action.

Respectfully submitted.

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v.

UNITED STATES OF AMERICA and ROBERT S. MCNAMARA, individually and as Secretary of Defense of the United States of America, *Defendants*.

NOTICE OF AMENDMENT TO COMPLAINT

Pursuant to Rule 9(2) of the Rules of this Court and Rule 15(a) of the referenced Federal Rules of Civil Procedure, Plaintiffs amend their complaint herein by adding to paragraph 4 thereof the following:

> Plaintiffs further aver that the continued presence of the said members of the Armed Forces in and near the City of Birmingham as aforesaid for the purposes so announced, has incited and will continue to incite the demonstrators and rioters to continued violence for so long as such troops remain and has obstructed and continues to obstruct the law enforcement authorities of the City of Birmingham, the County of Jefferson and the State of Alabama from restoring order and remitting the demonstrators to the lawful assertion of their claims through the legislative and judicial agencies of the government of the State of Alabama or of the United States.

Respectfully submitted,

/s/ JOHN P. KOHN
John P. Kohn
Of Counsel for Plaintiffs.

May 23, 1963

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

I

JURISDICTION

This is an original action for injunctive and declaratory relief brought by the State of Alabama and by George C. Wallace as its Governor against the United States and Robert S. McNamara pursuant to Art. III, sec. 2, cl. 2, of the Constitution of the United States and to the implementing statutes giving this Court original non-exclusive jurisdiction over "controversies between the United States and a State" (28 U.S.C. § 1251(b)(2)). Plaintiffs filed this complaint on May 18, 1963, together with a motion for leave to

file pursuant to Rule 9 of this Court's Rules. The present brief is submitted in support of that motion and in support of plaintiffs' prayer for an advanced date of hearing and interim relief restoring the status quo pending final decision of this Court.

II

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to grant injunctive relief as prayed in the Complaint against the defendants?

2. Does the Secretary of Defense of the United States, acting pursuant to a directive from the President of the United States, have authority to send federal troops into the State of Alabama to suppress civil domestic violence wholly within the State of Alabama unless and until the Legislature of the State, or the Executive (when the Legislature cannot be convened), makes application to the United States for such assistance?

3. Is Title 10, Section 333 of the United States Code, 70A Stat. 15, constitutional as applied?

4. Was the Fourteenth Amendment to the Constitution of the United States validly adopted?

III

IMPORTANCE

For the first time since the era of Reconstruction an American President has ordered federal troops sent into a State, not in enforcement of a federal court order as in Little Rock or at the University of Mississippi, but as an exercise of personal power based on an assertion that he intended to suppress civil violence which was openly and unquestionably within the exclusive powers of the law enforcement officials of the State to control. Coincidentally the President made public announcements which had the effect of inciting the rioters by convincing them that the

federal army would support and protect the very persons advocating the riots and would block the efforts of the law enforcement authorities of the State.

This is the very situation that the framers of the Constitution had in mind when they forbade the sending of federal troops into a State to suppress domestic violence except upon the request of the State legislature or governor. Nothing could more greatly endanger the continuance of the federal system described in our Constitution than judicial sanction of self-authorized use of federal troops against lawful State authority by the Commander in Chief of our Armed Forces. Such action, if tolerated by this Court, would in effect create a military dictatorship.

Not only was the President's action unjustified in law, it was unsupportable in fact. The riots had been quelled before the troops were sent in. The State, county and city authorities were fully in control of the situation, all courts within Alabama were functioning, the civil governments of Alabama, Jefferson County and the City of Birmingham were functioning, and there was no insurrection or rebellion in existence.

IV

FACTS

Negro leaders in the City of Birmingham have for some time campaigned for compulsory percentage employment of negroes in various commercial establishments of the City and have made other demands for broader acceptance of negroes by the business community.

This situation changed radically following the coming to Birmingham of certain professional racial agitators and provocateers named in the complaint. Immediately thereafter, and continuing through the early days of this month, a large number of the negroes in the City changed their campaign to one of active civil disobedience, filling the streets and blocking sidewalks and other public places,

obstructing traffic by holding unauthorized parades and disturbing the peace and frightening other citizens by group shouting and threats.

As tension mounted in the City, the standby assistance of the State of Alabama was requested by local officials. During the time the demonstrations were being staged, the City of Birmingham secured a State court injunction against further demonstrations. Martin Luther King publicly defied this injunction and encouraged others to do the same.

While the law enforcement officers of the City were restoring order, many of the police were violently attacked and several seriously wounded. Nevertheless the law enforcement officials of the City and of the State had brought the situation under control by May 11th without serious injury to any of the rioters. Many of the highway patrolmen had left Birmingham because everything appeared to be relatively quiet.

However, on May 11th two bombing incidents took place in the City at locations openly indicative of either a real or purported racial hostility. No one was injured and no arrests have yet been made, even though State, local and federal officers are conducting an investigation.

Immediately after the bombings between 2,000 and 3,000 Negroes rioted. They burned several store buildings, destroyed numerous automobiles, committed acts of violence against police and law enforcement officials and refused to allow fire-fighting equipment to come into the area where they had set fire to buildings, which in some instances included their own property. A number of white citizens were attacked by negroes and some seriously injured. After members of the State of Alabama Highway Patrol arrived back at the scene, the riots were brought under control.

Within a day the streets were again cleared of the demonstrators and the City was returned to approximately its normal order. At no time during these riots was more than a small portion of the available law enforcement officers of the State needed or in use. The existing civil violence was openly confined to a small section of one city in the whole state and its suppression was unmistakably within the power of the immediately available police.

Notwithstanding this situation the President of the United States on May 12, after the city had been returned to approximately its normal order, announced that he would send federal riot trained troops to the vicinity of Birmingham for the stated purpose of suppressing such civil violence as is referred to in 10 U.S.C. § 333. Not only had the Alabama Legislature not requested the assistance of such troops but the sending of this military force into the State of Alabama was done over the repeated objection of the State's Chief Executive.

Moreover, in taking this action, the President chose to make a public announcement that he was sending such specially trained troops for the purpose of operating against the State authorities if they acted to quell any further rioting, sent a telegram to the plaintiff, Governor George C. Wallace, to that effect and released the same to the newspapers (Exhibit A). At the time the President made such announcement, he had reason to believe that he lacked the power to take the action which he was threatening (Exhibit B).

The defendant McNamara carried out the instructions of the President and sent approximately 3,000 troops to the Birmingham area. Even though the planning of the troop movement was veiled in secrecy, it soon became publicly known that these were specially trained riot control groups, some of which were sent to Birmingham itself, both officers and men, with military vehicles. The Army force in the City of Birmingham immediately began to

map the city and set up a command post believed to be at 2121 Eighth Avenue North. This post is believed to have been under Major General Charles Billingslea, assisted by Brigadier General John T. Corley and a number of aides.

The sending of these troops, the establishing of their commander in Birmingham, in conjunction with the public statements of the President and others in the federal government that they would be used in Birmingham in the event of further riot, have caused and are causing continuing unrest in the City and have been and were intended to be interpreted as indicating that the federal government will support the activities and demonstrations of the rioters and will use troops to protect them from the police and other law enforcement agencies of the City and State. This has created an explosive situation which has forced the State to continue to maintain State patrolmen in Birmingham on a standby basis.

Until these troops are removed such civil unrest and sporadic outbreaks of crime and violence will continue and will prevent any complete restoration of peace and order in the City of Birmingham.

V

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

Constitution

1. Art. I, § 8, cl. 15

> "The Congress shall have power . . .
>
> "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;"

2. Art. III, § 2, cl. 1

> "The judicial power shall extend to all cases . . . arising under this Constitution . . . to controversies to which the United States shall be a party."

3. Art. III, § 2, cl. 2

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. . . ."

4. Art. IV, § 4

"The United States shall guarantee to every State in this Union a republican form of government, and shall potect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

5. Art. XIV, § 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code

5. Tit. 10, sec. 333

"*Interference with State and Federal law.*

"The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

"(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

"(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

"In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution."

6. Tit. 18, sec. 1385

"Use of Army and Air Force as posse comitatus.

"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

7. Tit. 28, sec. 1251(b)(2)

"Original Jurisdiction.

• • • •

"(b) The Supreme Court shall have original but not exclusive jurisdiction of:

• • • •

"(2) All controversies between the United States and a State; . . ."

VI

SUMMARY OF ARGUMENT

1. The Court has jurisdiction of the subject matter and the parties, and an appropriate case is presented for the granting of injunctive relief.

2. The action of the defendants in sending members of the Armed Forces into the State of Alabama on May 14, 1963, and keeping them within the State, for the confessed purpose of suppressing domestic violence which may in the future occur within the State, constitutes a repudiation of the guaranty of the republican form of government which Art. IV, § 4, of the Constitution of the United States makes the obligation of the federal government.

3. The sending of troops into Alabama under the circumstances of this case is not authorized by the plain language of 10 U.S.C. § 333; or if 10 U.S.C. § 333 could be so interpreted it would be clearly unconstitutional.

4. The ratification of the Fourteenth Amendment by the Southern States was compelled under the same conditions of military duress as is exemplified by the current action of the President in this case and is voidable.

VII

ARGUMENT

1. The Court has jurisdiction of the subject matter and the parties, and an appropriate case is presented for the granting of injunctive relief

1. This Court has jurisdiction of the subject matter and the parties to this action. Art. III, § 2, cl. 1, provides:

> "The judicial power shall extend to all cases . . . arising under this Constitution . . . to controversies to which the United States shall be a party."

Art. III, § 2, cl. 2, provides:

> "In all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction."

The Congress has specifically reconfirmed and expanded such jurisdiction in 28 U.S.C. § 1251(b)(2), which provides:

> "(b) The Supreme Court shall have original but not exclusive jurisdiction of:
>
> • • • •
>
> "(2) all controversies between the United States and a State; . . ."

2. This jurisdiction is possibly the most important grant of power which has been made to this Court. It makes this Court the ultimate force to preserve and maintain the federal-state relationship created by the Founding Fathers.

When the thirteen original colonies made a unanimous declaration on July 4, 1776, the framers of the Declaration of Independence stated that:

> "The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world. . . . He has kept among us, in times of peace, standing armies, without the consent of our legislatures. He has affected to render the military independent of, and superior to the civil power. . . . For quartering large bodies of Armed Forces among us. . . . For taking away our charters, abolishing our most valuable laws, and altering fundamentally our forms of Government."
>
> Declaration of Independence

This historic document ended civic "tyranny over the human mind."

And Mr. Madison, Father of the Constitution, in an essay, said (4 *Writings of Madison*, pp. 472-3):

> "The political system of the United States claims still higher praise. The power delegated by the people is first divided between the General Government and the State governments, each of which is then subdivided into legislative, executive, and judiciary departments. And as in a single government these departments are to be kept separate and safe by a defensive armour for each so, it is to be hoped, do the two governments possess each the means of preventing or correcting the unconstitutional encroachments of the other. Should this improvement in the theory of free government not be marred in the execution, it may prove the best legacy ever left by lawgivers in their country, and the best lesson ever given to the world by its benefactors. If a security against power lies in the division of it into parts mutually controlling each other, the security must increase with the increase of the parts into which the whole can be conveniently formed."

3. The subject matter of this case presents an appropriate occasion for injunctive relief. As indicated in the statement of facts, the injury caused by the presence of the Armed Forces in the State of Alabama is presently occurring; so that cases concerning the impropriety of deciding future constitutional questions are not here relevant. The facts present a case of irreparable injury in which the ordinary legal remedies are entirely inadequate. The threat to domestic law and order within Alabama posed by the continuing presence of the Armed Forces is immediate, and can only be removed by the granting of the restraining order against the defendants which is requested in the Bill of Complaint.

2. The action of the defendants in sending members of the Armed Forces into the State of Alabama on May 14, 1963, and keeping them within the State, for the confessed purpose of suppressing domestic violence which may in the future occur within the State, constitutes a repudiation of the guaranty of the republican form of government which Art. IV, § 4, of the Constitution of the United States makes the obligation of the Federal Government

Based upon the facts of this individual case, it is submitted that the President was without constitutional authority to send members of the Armed Forces into the State of Alabama for the alleged purpose of suppressing domestic violence when the State and local law enforcement officials were able and had not refused or failed to suppress the domestic violence which had occurred within the City of Birmingham.

The deployment of members of the Armed Forces in the City of Birmingham, Alabama, and at two federal reservations within Alabama (Fort McClellan and Maxwell Air Force Base), for the confessed purpose of suppressing domestic violence, abrogates the guaranty of a republican form of government provided by Art. IV, § 4, of the Constitution, which provides:

> "The United States shall guarantee to every State in the Union a republican form of Government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the Legislature cannot be convened), against domestic violence."

This provision of the Constitution has been applied by the Executive and interpreted by this Court numerous times in the past, but never under circumstances at all similar to those in the present case. This guaranty is so basic and so specific that it is not subject to interpretative overriding or supplanting by generalized provisions of the Constitution—such as the Fourteenth Amendment—or, *a fortiori*, by general statutory language authorizing the use of troops—such as 10 U.S.C. § 333.

The words

> "and on application of the legislature, or of the executive (when the legislature cannot be convened)"

state an inflexible prerequisite to action which may be taken by the United States for the purpose of protecting a State "against domestic violence."

The framers of the Constitution were explicit in providing that the United States should guarantee to every State a republican form of government and protect each against domestic violence upon application of the legislature or of the executive when the legislature could not be convened. The duty rest upon the United States, including the executive, legislative and judicial branches thereof. A breach of this duty entitles the party against whom the injury flows to a cause of action if we are still a government of laws. This Court has the obligation to see that this most basic constitutional guaranty is not usurped. For to remain silent would but encourage arbitrary power.

The Founding Fathers, still cognizant of the awesome power of a central government, were explicit in providing

that the legislature of a State must act, when possible, in order to bring in troops of the United States to deal with domestic violence. As indicated in the previous excerpt from the Declaration of Independence, the sound of the Red Coats marching in their streets was still remembered in the Constitutional Convention. The constitutional provision is too specific to be misunderstood. This constitutional obligation rests upon the United States, of which this Court is a part.

This section of the Constitution was carefully analyzed by the Court in *Luther* v. *Borden*, 7 How. 1, 12 L. Ed. 581 (1849), where it was held that State militia, called out by the governor, did not commit trespass by breaking into the house of a person who was engaged in insurrection against the State.

Discussing Art. IV, § 4, of the Constitution and the second clause of § 1 of the Act of February 28, 1795 (enacted pursuant to this provision of the Constitution), the Court said (7 How. 1, 42-3, 12 L. Ed. 581, 599):

> "The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; *and on the application of the Legislature or of the executive (when the Legislature cannot be convened) against domestic violence.* . . .
>
> "So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested upon Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the Act of February 28, 1795, provided, that, 'in case of an insurrection in any

> State against the government thereof it shall be lawful for the President of the United States, *on application of the Legislature of such State or of the executive (when the Legislature cannot be convened)*, to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.'
>
> "By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. *He is to act upon the application of the Legislature or of the executive*, and consequently he must determine what body of men constitute the Legislature, and who is the governor, before he can act." (Emphasis added)

In the same case, distinguishing between the President's power to call out the militia to repel invasion (provided in the first clause of § 1 of the Act of February 28, 1795) and the authorization for a call to suppress an insurrection against a State government (provided in the second clause of the same section), the Court remarked (7 How. 1, 44-5, 12 L. Ed. 581, 600):

> "A question very similar to this arose in the case of *Martin* v. *Mott*, 12 Wheat. 29-31. The first clause of the first section of the Act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State government. *The power given to the President in each case is the same, with this difference only: that it cannot be exercised by him in the latter case, except upon the application of the Legislature or executive of the State.*" (Emphasis added)

Martin v. *Mott*, 12 Wheat. 19, 6 L. Ed. 537 (1827) (cited in *Luther* v. *Borden, supra*), upheld the punishment by court-martial of a militiaman who refused to obey the orders of the President calling him into the public service under the Act of 1795. The power exercised by the President in this case was the authority granted by the Congress

to call forth the militia in cases of actual or imminent invasion. As pointed out later by the Court in *Luther* v. *Borden*, such power could be exercised by the President without the necessity of an application from the legislature or executive of a State. Yet, even in this case involving the power to repel threatened invasion—which is certainly a higher power than the authority given to the United States by the Constitution to protect the States against "domestic violence"—the Court cautioned (12 Wheat. 19, 29, 32, 6 L. Ed. 537, 540-1):

> "The power thus confided by Congress to the President is doubtless of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. . . .
>
> "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself."

The limits imposed by the Constitution upon the power of the United States over the internal affairs of a State were clearly indicated, in terms of Art. IV, § 4, in *South Carolina* v. *United States*, 199 U.S. 437 (1905), where it was held that license taxes charged by the Federal Government upon persons selling liquor were not invalidated by the fact that they were agents of a State engaging in that business. There the Court remarked (*id.* 451):

> "Each State is subject only to the limitations prescribed by the Constitution, and within its own territory is otherwise supreme. *Its internal affairs are matters of its own discretion.* The Constitution provides that 'the United States shall guarantee to every State in this Union a republican form of government.' Art. IV, sec. 4. *That expresses the full limit of national control over the internal affairs of a State.*" (Emphasis added)

In *United States* v. *Cruikshank*, 92 U.S. 542 (1876), indictments under the Enforcement Act of May 31, 1870, were dismissed essentially for the reason that they charged no more than a conspiracy to commit a breach of peace within a State. The factual situation was closely similar to that presented in the present case, and the Court's statements regarding the guaranty of Art. IV, § 4, are particularly apposite (*id.*, 593):

> "The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted. . . . There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. *Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the Executive, when the Legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution, art. IV, sec. 4; but it applies to no case like this.*" (Emphasis added)

That the United States, in enforcing the equal protection guaranteed by the Fourteenth Amendment, is limited strictly by the Constitutional mandate to guarantee to the States a republican form of government, was stated clearly by the Court in *Cruikshank* (92 U.S. 542, 554-5):

> "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not . . . add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the

States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty."

The difference between "mere police duty in the States" (cf. *United States* v. *Cruikshank, supra*), which is not a necessary or proper function of the Federal Government, and the protection of the national interest in a stable form of government, which is an appropriate task for the United States to undertake, is graphically illustrated by *Commonwealth* v. *Nelson*, 350 U.S. 497 (1956). The Court held that the Smith Act of 1940, as amended in 1948, which prohibits the knowing advocacy of the overthrow of the government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct.

This Court noted in *Nelson* that its decision did not "limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds" (350 U.S. 497, 500, n. 8), quoting the following language from the opinion of the Supreme Court of Pennsylvania in the same case (377 Pa. 58, 70, 104 A. 2d 133, 139 (1954)):

> "Nor is a State stripped of its means of self-defense by the suspension of its sedition statute through the entry of the Federal Government upon the field. *There are many valid laws on Pennsylvania's statute books adequate for coping effectively with actual or threatened internal civil disturbances.* As to the nationwide threat to all citizens, imbedded in the type of conduct interdicted by a sedition act, we are—all of us—protected by the Smith Act and in a manner more efficient and more consistent with the service of our national welfare in all respects." (Emphasis added)

Both this Court and the Supreme Court of Pennsylvania recognized that the duty of suppressing sedition within a state—unlike the function of local law enforcement—is

placed directly upon the Federal Government by virtue of the constitutional provision charging the United States with the duty of guaranteeing to every state a republican form of government. Quoting from the Congressional finding of necessity in the Subversive Activities Control Act of 1950, this Court said (350 U.S. 497, 504-5):

> "Congress has devised an all-embracing program for resistance to the various forms of totalitarian aggression. . . . It accordingly proscribed sedition against all government in the nation—national, state and local. Congress declared that these steps were taken 'to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government * * *' [50 U.S.C. § 781 (15)]. Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem. As was said in the court below:
>
> > " 'Sedition against the United States is not a *local* offense. It is a crime against the *Nation* * * *.' " [377 Pa., at page 76, 104 A. 2d, at page 142.] (Emphasis in original)

Nor may the determination of these delicate and difficult issues be avoided as involving no more than a political question.

In our more enlightened era, an objection that a suit seeks protection of a political right "is little more than a play on words." *Nixon* v. *Herndon*, 273 U.S. 536, 540 (1927); *Baker* v. *Carr*, 369 U.S. 186, 209 (1962).

In *Luther* v. *Borden*, 7 How. 1 (1849), this Court implied that the "political barrier" question was not an absolute. In *Baker* v. *Carr*, this Court commented on the *Luther* case, thusly (369 U.S. 186, 222, n. 48):

> "Even though the Court wrote of unrestrained legislative and executive authority under this Guaranty, thus making its enforcement a political question, the

> Court plainly implied that the political question barrier was no absolute: 'Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it.' 7 How., at 45. Of course, it does not necessarily follow that if Congress did not act, the Court would. For while the judiciary might be able to decide the limits of the meaning of 'republican form', and thus the factor of lack of criteria might fall away, there would remain other possible barriers to decision because of primary commitment to another branch, which would have to be considered in the particular fact setting presented."

Mr. Justice Douglas, concurring in the same case, approved the determination of this question by the judicial branch, saying:

> ". . . that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable."

He further said (369 U.S. 186, 242, n. 2):

> "What he [Justice Woodbury in *Luther* v. *Borden*] wrote was later to become the tradition, as expressed by Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U.S. 378, 401: 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are *judicial questions.*" (Emphasis supplied)

Georgia v. *Stanton*, 6 Wall. 50, 18 L. Ed. 721 (1867), was no more "political" than a host of others this Court has entertained. See e.g. *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Alabama* v. *Texas*, 347 U.S. 272 (1954); *Baker* v. *Carr*, *supra*.

Today, would this Court hold non-justiciable or "political" this suit to enjoin the Secretary of Defense from acting under an order which would allow him to use mili-

tary force and take over the law enforcement machinery of a sovereign State? As Mr. Justice Douglas said in *Baker* v. *Carr*, 369 U.S. 186, 246, n. 3 (1962):

> "Georgia v. Stanton (U.S.) 6 Wall. 50, 18 L. Ed. 721, involved the application of the Reconstruction Acts to Georgia—laws which destroyed by force the internal regime of that State. Yet the Court refused to take jurisdiction. That question was no more 'political' than a host of others we have entertained. See, e.g. Pennsylvania v. West Virginia, 262 U.S. 553, 67 L. Ed. 1117, 43 S. Ct. 658, 32 ALR 300; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 26 ALR 2d 1378; Alabama v. Texas, 347 U.S. 272, 98 L. Ed. 689, 74 S. Ct. 481.
>
> "Today would this Court hold non-justiciable or 'political' a suit to enjoin a Governor who, like Fidel Castro, takes everything into his own hands and suspends all election laws?
>
> "Georgia v. Stanton (U.S.) 6 Wall. 50, 18 L. Ed. 721, supra, expresses a philosophy at war with Ex parte Milligan, 4 Wall. 2, and Duncan v. Kahanamoku, 327 U.S. 304, 90 L. Ed. 688, 66 S. Ct. 606. The dominance of the civilian authority has been expressed from the beginning. See Wise v. Withers (U.S.) 3 Cranch 331, 337, 2 L. Ed. 457; Sterling v. Constantin, 287 U.S. 378, 77 L. Ed. 375, 53 S. Ct. 190, supra, note 2."

While this Court is possessed of neither the purse nor the sword, it should not abdicate its jurisdiction behind any guise of non-justiciability or "political" question, where the facts specifically show that the executive branch of government is exercising an arbitrary power which can only lead to ultimate despotism.

The State of Alabama has standing, as *parens patriae*, to protect its citizens against the breach of the duty on the part of the United States to guarantee to it a republican form of government. This Court has held that a state has standing to sue to protect its sovereign right to take

game. *Missouri* v. *Holland*, 252 U.S. 416 (1919). Is not the right to local self-government and the handling of domestic affairs of more importance than the right to shoot and take wild ducks? The people of each State compose a State, having its own government, and endowed with all the functions essential to *separate and independent existence*. Without the States in the Union, there could be no such political body as the United States. *Texas* v. *White*, 7 Wall. 700, 725 (1868). As this Court further stated in *Texas* v. *White* (*ibid.*):

> "... the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

On its face it might seem that this Court's cases of *Georgia* v. *Stanton*, 6 Wall. 50 (1867), and *Mississippi* v. *Johnson*, 4 Wall. 475 (1867), are contrary to the argument here made. But a close look at these cases shows that the issues are different. In *Georgia* v. *Stanton*, *supra*, the Congress had clearly refused to recognize the existence of a valid State government in Georgia. The case of *Mississippi* v. *Johnson*, *supra*, only stands for the elementary proposition that this Court will not accept a bill requiring it to direct the President in the personal performance of his discretionary powers.

Under this set of facts, therefore, we submit that there is a justiciable controversy, and there are presented to this Court for review serious questions touching the continuance of constitutional law in this Nation under our federal system. We further submit that the Constitution of the United States also provides, in the Ninth and Tenth Amendments thereto, that all powers not expressly delegated in the Constitution are reserved to the People or to the States. The enforcement of its laws and the suppression of domestic violence have, since time immemorial, been a function of

State government. The continued presence of the troops of the Armed Forces within the State of Alabama under the threat that they will be used can only mean that we are on the threshold of a military dictatorship unless this Court restrains the use of said troops in accordance with our prayer for relief in this case.

3. The sending of troops into Alabama under the circumstances of this case is not authorized by the plain language of 10 U.S.C. § 333; or if 10 U.S.C. § 333 could be so interpreted it would be clearly unconstitutional

The President's telegram to Governor Wallace, dated May 13, 1963, states in pertinent part (Exhibit A):

> "In response to the question raised in your telegram of last night, Federal troops will be sent into Birmingham, if necessary, under the authority of Title 10, § 333, Paragraph 1 of the United States Code relating to the suppression of domestic violence."

About 3,000 troops were in fact sent to Alabama and a command post was set up in Birmingham.

10 U.S.C. § 333, cl. 1, authorizes the President to use the militia or the armed forces "to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy," but specifically limits any action thereunder to situations where

> "the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection."

Such was not the case in the State of Alabama on May 13, 1963, and is not the case now. The constituted authorities of that State have at all times been able, and have not failed or refused, to protect any and all rights, privileges, and immunities, and to afford the protection named in the Constitution.

That the military powers of the President acting under constitutional provisions are limited, and can be questioned by the courts in their exercise, is clearly shown by *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). An Executive Order directing the Secretary of Commerce to seize steel mills was held to be unauthorized by Constitutional provisions granting powers to the President, particularly Article II,* even though the order was made on findings of the President that his action was necessary as a war measure to avert a national catastrophe which would inevitably result from a stoppage of steel production during the Korean conflict. *A fortiori*, the exercise of military powers by the President under statutory provisions should be carefully scrutinized by this Court, and permitted only when clearly authorized by the statute.

The concurring opinion of Mr. Justice Jackson in *Youngstown Sheet & Tube Co., supra*, contains statements which are pertinent to the case at bar. This opinion points out (343 U.S. 579, 644-5):

> "There are indications that the Constitution did not contemplate that the title Commander-in-Chief *of the Army and Navy* will constitute him also Commander-in-Chief of the country, its industries and its inhabitants . . . .
>
> "That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history . . . .
>
> "It also was expressly left to Congress to 'provide for calling forth the Militia to execute the laws of the

---

* "The executive Power shall be vested in a President . . ." "he shall take care that the Laws be faithfully executed" "shall be Commander in Chief of the Army and Navy of the United States."

> Union, suppress Insurrections and repel Invasions. . . .'[11] Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy. Congress, fulfilling that function, has authorized the President to use the army to enforce certain civil rights.[12] On the other hand, Congress has forbidden him to use the army for the purpose of executing general laws except when *expressly* authorized by the Constitution or by Act of Congress.[13]

"[11] U.S. Const., Art. I, § 8, cl. 15.

[12] 14 Stat. 29, 16 Stat. 143, 8 U.S.C. § 55 [later transferred to 42 U.S.C. § 1993, and repealed, 71 Stat. 637 (1957)].

[13] 20 Stat. 152, 10 U.S.C. § 15 [now 18 U.S.C. § 1385, the so-called 'posse comitatus' statute]." (Emphasis in original)

The principles expressed by the Court in *Youngstown Sheet & Tube Co.* are equally applicable to Art. IV, § 4, in the present case and the statute invoked by the President must be read in the light of these provisions. As an analogy, we can take the interpretation of militia statutes under Art. I, § 8, cl. 15, which conferred upon the Congress the power:

> "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

In addition to the lack of any application by the State of Alabama for the protection of the State against "domestic violence," the significant fact is that there did not exist in the State at any pertinent time the kind of "domestic violence" which statutes empowering the domestic use of the Armed Forces have long been interpreted to encompass. All of the situations to which such statutes have been historically applied presented cases of "domestic violence" similar to, or closely approaching, "insurrection." The

commonly accepted definition of the latter term—which certainly does not apply to the facts of the present case—is (Webster's New International Dictionary, 2d ed., 1959):

> "Act or instance of revolting against civil or political authority, or the established government."

The type of situation to which the constitutional power to suppress insurrection by military means was, nearly a century ago, held to be inapplicable is aptly illustrated by *Raymond* v. *Thomas*, 91 U.S. 712 (1875). The Court voided an order of a military commander in South Carolina, during the Reconstruction Period, which wholly annulled a decree in equity made by a competent judicial officer of South Carolina. Even though the statutes under which the officer acted gave "very large governmental powers to the military commanders designated, within the States committed respectively to their jurisdiction" (*id.*, 715), the Court refused to tolerate this kind of interference in the internal affairs of a State.

Borrowing from the opinion in *Raymond* v. *Thomas*, it is respectfully submitted that "the clearest language would be necessary" to justify a finding that the Congress intended 10 U.S.C. § 333 to be applied merely for internal police purposes, as is being attempted in the present case (91 U.S. 712, 715). Such use of the Armed Forces is, indeed, "an arbitrary stretch of authority, needful to no good end that can be imagined" (*id.*, 716).

This Court has been reluctant to interpret statutes as extending the military power to supplant civilian authority except where absolutely essential for protection against invasion or similar strictly military purposes. Not even the existence of a major war was thought to be sufficient justification for the imposition of complete martial law, in *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946). There the essential question was whether the Hawaiian Organic Act during the period of martial law during World War II

gave the armed forces power to override civilian authority and to substitute military decisions for judicial trials under the emergency conditions existing in Hawaii at that time.

Section 67 of the Organic Act (31 Stat. 141, 48 U.S.C. § 532) authorized the governor to place the Territory under martial law "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it."

Failing to find an answer to the question of the scope of "martial law" in either the language or the legislative history of the Organic Act, the Court looked to other sources in order to interpret that term. The Court said (327 U.S. 304, 319):

> "We think the answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act . . . .
>
> "People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which according to the government Congress has authorized here. In this country that fear has become part of our cultural and political institutions."

The Court concluded (*id.*, 324):

> "We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of 'martial law' it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase 'martial law' as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals."

Similarly, 10 U.S.C. § 333 is taken from the old Ku Klux Act passed on April 20, 1871, 17 Stat. 14. As background for the Reconstruction Statute, this Court said in *United States* v. *Williams*, 341 U.S. 70, 74 (1951):

> "The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues. The sections before us are no exception. Although enacted together, they were proposed by different sponsors and hastily adopted. They received little attention in debate."

The same theme was followed in *Collins* v. *Hardyman*, 341 U.S. 651, 656-7 (1951), where this Court, speaking of another of the Reconstruction Acts, said:

> "This statutory provision has long been dormant. It was introduced into the federal statutes by the Act of April 20, 1871, entitled, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes'. The Act was among the last of the reconstruction legislation to be based on the 'conquered province' theory which prevailed in Congress for a period following the Civil War. This statute, without separability provisions, established the civil liability with which we are here concerned as well as other civil liabilities, together with parallel criminal liabilities. It also provided that unlawful combinations and conspiracies named in the Act might be deemed rebellions, and authorized the President to employ the militia to suppress them. The President was also authorized to suspend the privilege of the writ of habeas corpus. It prohibited any person from being a federal grand or petit juror in any case arising under the Act unless he took and subscribed an oath in open court 'that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy'. Heavy penalties and liabilities were laid upon any person who, with knowledge of such conspiracies, aided them or failed to do what he could to suppress them.

> "The Act, popularly known as the Ku Klux Act, was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction."

This Court said in *Collins* v. *Hardyman, supra,* that the Civil Rights Acts were not to be used to *centralize power so as to upset the federal system.* If this Court validates the actions taken by the President in this case, then there is no limit to his power to use Armed Forces in any State at any time to suppress any type of violence including street fights. Executive power will then have become absolute.

10 U.S.C. § 333 has never before been invoked except for the specific enforcement of federal court orders where State authorities were directly obstructing the court's mandate.

Thus, in 1957 President Eisenhower employed federal troops to enforce federal court orders in connection with integration of the public schools in Little Rock, Arkansas. The legal basis for such action is to be found in the opinion of the Attorney General, entitled "President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas," which states (41 Op. A.G., November 7, 1957):

> "Congress declared in this statute [10 U.S.C. § 333] when the execution of the laws is so hindered, *without State protection,* the State shall be considered to have denied the equal protection of the laws secured by the Constitution.
>
> "I also advised you that the execution of the laws of Arkansas and of the United States within the State of Arkansas was being hindered by unlawful combinations so as to deprive people in that State of a right, privilege, immunity, or protection named in the Constitution and secured by law, *and that the appropriate*

State authorities were unable, unwilling, or failed to protect that right, privilege, immunity, or to give that protection. The requisites of law were met (10 U.S.C. 333).". (Emphasis added)

A further objection to interpreting 10 U.S.C. § 333 as authorizing troops in the present case is that this would directed conflict with 18 U.S.C. § 1385, the so-called posse comitatus statute. This Act provides:

> "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Construing this statute, a federal district court recently held that even the use of an Air Force helicopter and its personnel to aid in a State's search for a nonmilitary prison escapee was forbidden, and that such personnel were so acting beyond their authority that the United States could not be held liable for their alleged negligence (*Wrynn* v. *United States*, 200 F. Supp. 457 (E.D.N.Y. 1961)). Concerning 18 U.S.C. § 1385, the Court said (*id.*, 464-5):

> "*The legislative history leaves little doubt that the statute is indeed meant 'to preclude the Army [or Air Force] from assisting local law enforcement officers in carrying out their duties'* (Gillars v. United States, 1950, 87 U.S. App. D.C. 16, 182 F. 2d 962, 972. Compare Chandler v. United States, 1st Cir., 1949, 171 F. 2d 921, 936) . . . .
>
> "The statute is not an anachronistic relic of an historical period the experience of which is irrelevant to the present. It is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats who sponsored it, as expressing '*the inherited antipathy of the American to the use of troops for civil purposes.*' (Sparks, National Development 1877-1885, p. 127, in Vol. 23, The American Nation, A History.)

Its relevancy to this age is sadly clear (1957, 41 Op. A.G. No. 67) . . . .

"Given the statute and its continuing vitality, *the use of the helicopter and its personnel here to aid in executing the laws of New York was a forbidden use.* It could not have been authorized on behalf of the United States by any action short of a Congressional enactment." (Emphasis added)

Further detailing the legislative history of 18 U.S.C. § 1385, the Court stated (*id.*, 464):

"Mr. Knott, who introduced the Section as an amendment to the Appropriation Bill, assumed only the existence and not the legitimacy of the practice (7 Cong. Rec. 3849) and argued the importance of stopping such uses of the military, under adequate punitive sanctions except where the Congress had expressly authorized the use (7 Cong. Rec. 3846-3847). He envisaged the penalty he proposed as applying to everyone, from the Commander in Chief to the lowest officer, who presumed to take upon himself to decide when he would use the military force in violation of the law of the land (7 Cong. Rec. 3847-3851) and visualized the statute as forbidding every employment of the Army or any part of it in aid of civil law enforcement unless under explicit statutory authorization (7 Cong. Rec. 3849). See, e.g. 10 U.S.C.A. § 331-334 (Presidential powers) . . . . The Senate debate indicated a sense that the section was not limited by the expression 'as a posse comitatus or otherwise' but was to operate as if the prohibition ran—simpliciter—against the use of the Army to execute the laws, without reference to whether employed as a posse comitatus or as a portion of the Army (7 Cong. Rec. 4241, 4245)."

Essentially the only decision of this Court approving the civil use of troops is *In re Debs*, 158 U.S. 564 (1894). There the use of federal troops, as well as the injunctive powers of the federal courts, was approved in quelling the train wrecking and employee attacks in Chicago, Illinois, which accompanied the Pullman strike of 1894. This case is clearly distinguishable from the instant case in that the

Federal Government was there acting to protect interstate commerce and the transmission of the mail, which are clearly national—not local—interests.

Of the two questions presented to the Court, the first question was (*id.*, 577):

> "Are the relations of the general government to interstate commerce and the transportation of the mails such to authorize a direct interference to prevent a forcible obstruction thereof?"

The Court answered this question in the affirmative, stating (*id.*, 582):

> "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation, to compel obedience to its laws."

In summary, there is no precedent in the history of the United States for the use of federal troops under the circumstances presented by the instant case. There is no authority for interpreting 10 U.S.C. § 333 so broadly as to permit the present disposition of the Armed Forces within the State of Alabama for the reasons alleged by the President.

Needless to say, Congress cannot enact legislation which is contrary to the Constitution. *Marbury* v. *Madison*, 1 Cranch. 137 (1803). This court has also invalidated executive action where such action was taken pursuant to invalid Congressional delegation. *Cole* v. *Young*, 351 U.S. 536 (1956); *Harmon* v. *Brucker*, 355 U.S. 579 (1958); *Cf: Peters* v. *Hobby*, 349 U.S. 331 (1955); and *Service* v. *Dulles*, 354 U.S. 363 (1957).

If 10 U.S.C. § 333 were to be interpreted as authorizing such use of the Armed Forces, it would be unconstitutional. We submit that under Art. IV, § 4, of the Constitution, the United States must guarantee to each State a republican form of government and this guarantee must be enforced by the executive, legislative and judicial branches of the Government.

Furthermore, 10 U.S.C. § 333 would be unconstitutional as here applied on the ground of being an invalid delegation of an unlimited discretion to the Executive. Such delegations of power violate the separation of powers structure and should be struck down. *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). See also *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).

Finally, an interpretation of 10 U.S.C. § 333 which would authorize the use of federal forces in the instant case would go far beyond any authority which this Court has ever recognized to be vested in the Congress under its power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions (Art. I, § 8, cl. 15), and would contradict the terms of 18 U.S.C. § 1385, the posse comitatus limitation.

4. The ratification of the Fourteenth Amendment by the Southern States was compelled under the same conditions of military duress as is exemplified by the current action of the President in this case and is voidable

We further submit that 10 U.S.C. § 333 would be unconstitutional to the extent that it was passed in furtherance of the Fourteenth Amendment since this Amendment is itself void as lacking proper ratification by the States.

This Court, sitting as a court of equity and as the final arbiter in all controversies wherein constitutional questions are raised, may take judicial notice of what all historians know and have known, and that is, that the Fourteenth Amendment was first rejected by the Southern States but that the Southern States were compelled to ratify the Fourteenth Amendment under federal military authority

as the price of restoration to the Union. The truth surrounding the ratification of the Fourteenth Amendment as known to historians should be vivid to this Court, and for present purposes this Court should refuse to recognize the validity of this Amendment which was secured by means contrary to the processes provided for amending the Constitution which appear in the Constitution itself.

Especially in view of the comments made in *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court has the power to inquire into the interpretive validity of an act of Congress passed in support of a constitutional amendment which was not ratified in accordance with express terms of the Constitution. Nor should this Court decide that the question of such validity is a political one and is therefore non-justiciable.

VIII

CONCLUSION

The sending of troops to Birmingham was unlawful as beyond the power of the President of the United States under the Constitution, outside the limitations of the statute he relied on for taking such action, and has caused and continues to cause irreparable damage to plaintiffs. The motion for leave to file a bill of complaint should be granted and a temporary injunction issued requiring restoration of the status quo by removal of the troops from the Birmingham area.

Failure to do this would in effect destroy our constitutional democracy. The long-continued struggle for liberty under law will have come to an end. For a dictatorship is a dictatorship regardless of its form.

Respectfully submitted,

/s/ JOHN P. KOHN
John P. Kohn,
Of Counsel for Plaintiffs

May 23, 1963

EXHIBIT A

May 13, 1963

To His Excellency George C. Wallace, Governor of Alabama

In response to the question raised in your telegram of last night, Federal troops will be sent into Birmingham, if necessary, under the authority of Title 10, Section 333, Paragraph 1 of the United States Code relating to the suppression of domestic violence. Under this Section, which has been invoked by my immediate predecessor and other Presidents as well as myself on previous occasions, the Congress entrusts to the President on determinations as to (1) the necessity for action (2) the means to be employed and (3) the adequacy or inadequacy of protection afforded by State authorities to the citizens of that State.

As stated, no final action has been taken under this Section with respect to Birmingham inasmuch as it continues to be my hope as I said last night, "that the citizens of Birmingham themselves will maintain standards of responsible conduct that will make outside intervention unnecessary." Also, as I said last Thursday, in the absence of any violations of Federal statutes or court orders or other grounds for Federal intervention, our efforts will continue to be focused on helping local citizens to achieve and maintain a peaceful reasonable settlement. The community leaders who worked out this agreement with a great sense of justice and foresight deserve to see it implemented in an atmosphere of law and order. I trust we can count on your constructive cooperation in maintaining such an atmosphere; but I would be derelict in my duty if I did not take the preliminary steps announced last night that will enable this government, if required, to meet its obligations without delay.

JFK

EXHIBIT B

Excerpt from The Washington Merry-Go-Round, THE WASHINGTON POST, Tuesday, May 21, 1963:

RACE RIOT LAWS

Attorney General Robert Kennedy, prodded by a bipartisan group of Senators, is studying whether he needs new laws to prevent future race riots.

He reported to the Senators in closed session in the Birmingham riots and listened to their suggestions for keeping the peace between Negroes and whites.

Kennedy claimed that the Birmingham police chief actually had done a good job of curbing the riots with a minimum of bloodshed. He blamed Safety Commissioner Eugene (Bull) Connor for what harsh methods were used.

The Attorney General pointed out that no Federal laws were violated in Birmingham, that the only authority the Justice Department had for intervening was an 1871 statute authorizing the Federal Government to suppress violence when it threatened citizens.

This led Sen. Phil Hart, Detroit Democrat, to express "grave concern" over the "legislative gap" in the civil rights laws. He suggested that there was a need for "clearer statutory authority."

Under the present laws, all the Federal Government can do is use its good offices to head off a race dispute or wait until the riot erupts to suppress it.

Sen. Hart suggested that the Attorney General should have authority to go to the courts and get an immediate order against threatened mob action.

This would bring the influence of the court to bear upon the mob leaders in advance and permit the Federal Government to move in with marshals or troops to enforce the court order immediately.

The idea was supported by most of the Senators at the conference, including Mansfield of Montana, Humphrey of Minnesota, Douglas of Illinois (Democrats), Javits of New York, Keating of New York, and Kuchel of California (Republicans).

Indeed, Javits earlier had wanted to offer this idea in the form of a civil rights amendment to the feed grain bill which passed the Senate last week.

But, Humphrey talked him out of it, warning that a public debate at this time would stir emotions and cause more trouble than it would cure.

Humphrey repeated the warning in closed meeting, suggesting that it would be better to discuss civil rights remedies quietly until southern tempers cooled. Sen. George Smathers (D-Fla.) echoed this warning, and the group agreed to keep their discussions behind closed doors.

Attorney General Kennedy agreed to ask his lawyers to study Hart's proposal. Later, the bipartisan group held another private session without the Attorney General and agreed to press him for a finding.